teenth century — that war is a relation between states and not between the private individuals composing the states.[13] As the result of all these reasons, at least one English authority on international law has stated the effect of the Declaration in its broadest terms.[14]

But it is not surprising that, in spite of all these arguments, the English court was unwilling to take any step which would in the least extend the scope of the Declaration of Paris, when the conventional English attitude toward the Declaration is borne in mind.[15] The United States, on the other hand, would naturally be disappointed with anything but the broadest possible interpretation of the Declaration, in view of the fact that this country has for over a hundred years contended unswervingly for the complete immunity of private property at sea, and that England is virtually the only country which is still firmly opposed to this principle.[16]

THE NATURE OF THE STOCKHOLDER'S LIABILITY FOR STOCK ISSUED AT A DISCOUNT. — When a corporation issues its stock at a discount, the original holder has been held liable to creditors of the corporation, in the event of insolvency, for the difference between the par value and the amount actually paid in, if that amount is needed to satisfy its creditors.[1] Various theories have been advanced to explain this result. Under the "trust fund" theory, the capital stock, including unpaid balances on

[13] A good account of the development of this theory on the continent and its reception by England and the United States is given by F. R. Stark, 8 COLUMBIA STUDIES IN HISTORY, ECONOMICS, AND PUBLIC LAW, [232–57]. Hall, on the other hand, virtually brands the doctrine as a mere fiction invented to attack the legality of private enemy property at sea. HALL, INT. LAW, 6 ed., 63–70. See also Dana's Note 171 to WHEATON.

[14] "We may therefore conclude that enemy ships and enemy goods on board them are now, by international law, the only enemy property which, as such, is capturable at sea." 2 WESTLAKE, 145.

[15] This attitude is exemplified by Mr. Bowles' book on the Declaration of Paris referred to above. An idea of his point of view may be gathered from the title of Chap. XII — "The Declaration of Paris — Unauthorized — Contradictory — False — And no Part of the Law of Nations." For an admirable defense of this part of the Declaration, see 144 EDINBURGH REVIEW, 353, 358–69 (1876).

[16] As early as 1785 the United States concluded a treaty with Prussia providing for the immunity of all private property at sea. She made the same proposition in 1823 to England, Russia, and France. She contended for the same doctrine in the Marcy Amendment after the Declaration of Paris. On the continent, Italy in 1865 incorporated the doctrine in her marine code and concluded a treaty on this basis with the United States in 1871. Austria and Prussia asserted the doctrine in their war of 1866. Prussia announced it at the outbreak of the Franco-Prussian war. See HALL, INT. LAW, 6 ed., 438–39, 441, [n. 1; 7 MOORE'S DIGEST, 461 *et seq.* Even in England the best opinion is not all in favor of the old belligerent rule. For a good statement of England's arguments against the new doctrine, based on the theory that her naval supremacy would be rendered useless, see Sir Edward Grey's instructions to the English delegates to the Hague Conference in 1907. HIGGINS, THE HAGUE PEACE CONFERENCES, 2 ed., 619–21. For the arguments on the other side, based on the growth of England's commerce, her dependence on it, and the danger of the malevolent neutrality of continental nations if her attitude continues, see 26 CONTEMPORARY REV. 735, 737–51 (1875); LOREBURN, CAPTURE AT SEA, Chaps. II and III.

[1] Scovill *v.* Thayer, 105 U. S. 143. See WARREN, CASES ON CORPORATIONS, 2 ed., 221.

stock issued at a discount, is said to be a fund for the benefit of all the creditors of the corporation.[2] Under the "holding out" theory, the liability is based upon a reliance by creditors on a representation of the stockholder that the stock has been fully paid up, and only such subsequent creditors can benefit.[3] It is to be observed, therefore, that the class of creditors entitled to recover varies according to the theory upon which the court proceeds. Another illustration of the variant results reached according to the theory adopted is presented by the recent case of *Courteney* v. *Georger*, 228 Fed. 859.[4] A Minnesota corporation issued stock, with a par value of one hundred dollars, for ten dollars per share, under an agreement that it should be regarded as fully paid up and non-assessable. The corporation became bankrupt and its trustee in bankruptcy, in pursuance of an order of the referee, issued a call upon holders of this stock in order to pay the debts of the corporation. The trustee sued, in the federal court, certain stockholders living in New York. It was held that he was not the proper person to maintain the action. The court based its decision upon the fact that in Minnesota, under the doctrine of *Hospes* v. *Northwestern Mfg. & Car Co.*,[5] the stockholder's liability is based upon a fraudulent representation and that only subsequent creditors who relied upon this representation can recover; that the liability is not an asset of the corporation, and therefore the bankruptcy act does not give the trustee the right to sue on behalf of the creditors who are injured.[6] This result is by no means desirable, for the bankruptcy court is peculiarly fitted to wind up the whole matter, yet under the Minnesota theory of the stockholder's liability, the court could not have reached a different conclusion.[7] Under the "trust fund" theory, however, the liability of the stockholder to pay the balance would have been implied, the agreement to the contrary held void, and this asset would have passed to the trustee in bankruptcy.[8] Has the *Hospes* case, then, in rejecting the "trust fund" theory as logically unsound, placed the stockholder's liability upon a more satisfactory basis?

Under both the "trust fund" theory and the "holding out" theory of the stockholder's liability for the unpaid balance, there is a feeling that "watered" stock is a wicked thing.[9] There are two classes of persons who may be deceived by its existence, — subsequent purchasers of

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[2] Wood *v.* Dummer, 3 Mason 308; Sawyer *v.* Hoag, 17 Wall (U. S.) 610.

[3] Hospes *v.* Northwestern Mfg. & Car. Co., 48 Minn. 174, 50 N. W. 1117.

[4] See RECENT CASES, p. 877.

[5] 48 Minn. 174, 50 N. W. 1117.

[6] *In re* Jassoy, 101 C. C. A. 641, 178 Fed. 515.

[7] The court treats the liability in the same manner as the double liability of a stockholder imposed by statute, making the stockholder a surety for the corporation. Such a liability is not provable against the corporation in bankruptcy. See Alsop *v.* Conway, 110 C. C. A. 366, 188 Fed. 568; *In re* Beachy & Co., 170 Fed. 825. But see Stocker *v.* Davidson, 74 Kan. 214, 86 Pac. 136, where the statute expressly made the liability of the stockholder an asset of the corporation in event of insolvency.

[8] Sawyer *v.* Hoag, 14 Wall. (U. S.) 610; Scovill *v.* Thayer, 105 U. S. 143.

[9] "'Watered' and 'bonus' stock is one of the greatest abuses connected with the management of modern corporations." Hospes *v.* Northwestern Mfg. & Car Co., 48 Minn. 174, 196, 50 N. W. 1117, 1120. "The idea that the capital of a corporation is a football to be thrown into the market for the purposes of speculation, that its value may be elevated or depressed to advance the interests of its managers, is a modern and wicked invention." Upton *v.* Tribilcock, 91 U. S. 45, 48.

the stock and creditors of the corporation who become such after the stock has been issued. Various attempts have been made to protect the unwary purchaser from deception by vendors of stock with no property behind it,[10] but it is safe to say that no business man would think of paying one hundred dollars for a share of stock simply because that amount is embossed upon the certificate. And it is doubtful whether a business man would give a corporation credit simply because of the amount of capital stock it purports to have. If, however, that were all there is to the problem, the theory adopted in the *Hospes* case would be ample protection for such creditors, and there would therefore be no quarrel with that explanation of the liability. And perhaps to-day, by the weight of authority, recovery is restricted to subsequent creditors who are presumed to have relied upon the false representations of the stockholders.[11]

But behind the feeling that "watered" stock is objectionable is a deeper reason. The courts and legislatures have felt that the stockholder with his limited liability is given a tremendous boon. It is therefore no more than common business decency that he should risk all that he has purported to risk. If the holder of a share of stock is to have his liability limited to one hundred dollars, it must be unlimited up to that amount.[12] It is not considered fair for him to have the benefit of prosperity and throw the risk of adversity upon the creditors of the corporation. In order to clothe this commercial demand in juristic garb, the "trust fund" theory was first advanced; then its too apparent inaccuracies led to the substitution of the "holding out" theory. This, however, gives no remedy to the prior creditor nor to subsequent creditors with notice of the issue at a discount, and to them the risk of failure of the enterprise is shifted. And this discrimination is made only by a forced presumption of reliance, that would be difficult to prove.[13] The truth is that the liability of the stockholder to pay in full for his stock is an obligation placed upon him because of his relation to the corporation.[14] Incidents of this obligation are that the corporation cannot change it or release the stockholder from its binding effect, and that the stockholder cannot avoid the obligation by the means available in the case of an ordinary debt.[15] On this theory the prin-

[10] See Alabama, etc. Co. *v.* Doyle, 210 Fed. 173, 175; 75 CENT. L. J. 221.

[11] Lea *v.* Iron Belt Co., 147 Ala. 421, 42 So. 415; State Trust Co. *v.* Turner, 111 Ga. 664, 36 S. E. 900; Hospes *v.* Northwestern Mfg. & Car. Co., 48 Minn. 174, 50 N. W. 1117; Gogebic Improvement Co. *v.* Iron Chief Mining Co., 78 Wis. 427, 47 N. W. 726. *Contra*, Easton National Bank *v.* American Brick Co., 70 N. J. Eq. 732, 64 Atl. 917; Sprague *v.* Nat'l Bank of Am., 172 Ill. 149, 50 N. E. 19; *cf.* Jones *v.* Whitworth, 94 Tenn. 602, 30 S. W. 736. But see Bent *v.* Underdown, 156, Ind. 516, 60 N. E. 307, where the creditors were held affected with constructive notice of a provision in the articles of association that only fifteen per cent of the par value should be paid.

[12] See Geo. W. Pepper, "Rights of Stockholders and Creditors in the Property of the Corporation," 34 AM. L. REG. (N. S.) 448, 456.

[13] Hospes *v.* Northwestern Mfg. & Car Co., 48 Minn. 174, 198, 50 N. W. 1117, 1121; Randall Printing Co. *v.* Sanitas Mineral Water Co., 120 Minn. 268, 139 N. W. 606.

[14] See Geo. W. Pepper, "Rights of Stockholders and Creditors in the Property of the Corporation," 34 AM. L. REG. (N. S.) 448, 459.

[15] Thus he may not avail himself of the right of set-off. Sawyer *v.* Hoag, 17 Wall. (U. S.) 610; Babbit *v.* Read, 173 Fed. 712. And after insolvency of the corporation, the right to rescind because of fraud is cut off against subsequent creditors. Gress

cipal case would have been decided differently and in accord with the practice under the earlier bankruptcy act, when the "trust fund" theory was in vogue.[16]

LIABILITY FOR WORDS IMPUTING CRIME. — Are spoken words, which charge a plaintiff with specific acts erroneously alleged to be criminal, actionable *per se?* A recent New York decision suggests this question. The defendant charged the plaintiff with riding on a free pass, and intimated that the act was subject to investigation by the grand jury, although in fact it was not a crime. The court held that the imputation was "libelous *per se.*" *Dooley* v. *Press Publishing Co.*, 170 N. Y. App. Div. 492.[1]

Spoken words imputing crime may be allegations of fact,[2] or they may draw conclusions of law.[3] Are they slanderous *per se* if they do both, and the allegations of fact negative the conclusions of law? Surely not if the hearers may be assumed to know the law, for then the words do not impute crime. This seems to be the tacit assumption of all the cases.[4] But if the hearers do not know the law, and wrongly believe that

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v. Knight, 135 Ga. 60, 68 S. E. 834; Cox *v.* Dixie, 48 Wash. 264, 93 Pac. 523. *Contra*, Haskell *v.* Worthington, 94 Mo. 560, 7 S. W. 481.

[16] See note 8. And to same effect under the present act, see *In re* Crystal Springs Bottling Co., 96 Fed. 945. The right to collect unpaid subscriptions, where there is no agreement that they shall not be paid in full, passes to the trustee in bankruptcy. See LOVELAND, BANKRUPTCY, 4 ed., § 392.

[1] The principal case was one of libel, but the New York courts frequently estimate libel with the aid of the common standards for words slanderous *per se.* The New York rule in libel does not differ essentially from that in other jurisdictions. Gates *v.* N. Y. Recorder Co., 155 N. Y. 228, 49 N. E. 769. Confusion has been caused, however, by failure to distinguish sharply enough between the definitions of libel and of slander. Moore *v.* Francis, 121 N. Y. 199, 204, 23 N. E. 1127, 1128. The confusion is explained and the New York rule well stated in Cady *v.* Brooklyn Union Pub. Co., 51 N. Y. Supp. 198: "The rule is of familiar statement, that not only do oral words which amount to slander *per se* constitute libel *per se* if written, but that in addition any written words soever which hold one up to disgrace, hatred, ridicule or contempt, are libelous *per se*, however much they may fall short of charging a criminal offense, or of amounting in any other respect to slander if only spoken."

[2] As, "thou hast killed thy master's cook," a sufficient charge of murder. Cooper *v.* Smith, Cro. Jac. 423.

[3] As, "you are an incendiary and a murderer." Noeninger *v.* Vogt, 88 Mo. 589.

[4] The most common type of case arises from the application to the plaintiff of a criminal epithet, supplemented by words which show the epithet inapplicable, as "thou art a thievish knave for thou hast stolen my wood," growing wood not being subject to larceny. Robins *v.* Hildredon, Cro. Jac. 1, 65. Minors *v.* Leeford, Cro. Jac. 1, 114 (*semble*); Christie *v.* Cowell, 1 Peake 4; Thomson *v.* Bernard, 1 Camp. 47; Lemon *v.* Simmons, 57 L. J. Q. B. 260; Jones *v.* Bush, 131 Ga. 421, 62 S. E. 279; Fawsett *v.* Clark, 48 Md. 494; Brown *v.* Myers, 40 Oh. St. 99; Egan *v.* Semrad, 113 Wis. 84, 88 N. W. 906; McCaleb *v.* Smith, 22 Ia. 242. Similar decisions are found in cases where it was apparent that the plaintiff could not have committed the crime imputed by the words in their ordinary sense. Snag *v.* Gee, 4 Rep. 16, and Williams *v.* Stott, 1 C. & M. 675, 684, as explained by Parke, B., in Heming *v.* Power, 10 M. & W. 564, 569; Jackson *v.* Adams, 2 Bing. N. C. 402. See Carter *v.* Andrews, 33 Mass. 1; Williams *v.* Miner, 18 Conn. 464, 473; and *cf.* Stewart *v.* Howe, 17 Ill. 71, where it was held slander *per se* to accuse a child under ten years old of larceny, though a child of that age was legally incapable of the crime. On the basis of this last case Odgers states the modern rule to be: "if the words would convey an imputation of felony to the minds of ordinary